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No.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2000

GEORGE GALAZA, WARDEN; ATTORNEY GENERAL OF THE STATE OF CALIFORNIA, *Petitioners*,

v.

JESUS NINO, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Similar to the question this Court recently ordered the parties to brief in *Slack v. McDaniel*, No. 98-6322, did the Ninth Circuit have jurisdiction to issue a 28 U.S.C. § 2253(c) certificate of appealability authorizing respondent to appeal the district court's denial of habeas relief on the ground the habeas petition was untimely -- i.e., a ground which does not concern the violation of a constitutional right?

2. The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) requires state prisoners to file federal habeas corpus petitions within one year from the finality of the conviction in state court, but permits the period to be tolled while the state prisoner has "a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgement or claim . . . pending . . ." 28 U.S.C. § 2244(d)(2) (West 1999).

Assuming the Ninth Circuit had jurisdiction to entertain an appeal, did the Ninth Circuit improperly hold that a matter is "pending" within the meaning of the AEDPA during the time between the disposition of one state application and the filing of a subsequent state application?

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IN THE SUPREME COURT OF THE UNITED STATES

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No.

GEORGE GALAZA, WARDEN; ATTORNEY GENERAL OF THE STATE OF CALIFORNIA, *Petitioners*,

v.

JESUS NINO, *Respondent*.

Petitioner George Galaza, Warden of the California State Prison at Corcoran, California, and petitioner the Attorney General of the State of California, respectfully petition for writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS AND ORDERS BELOW

District Court Order, filed September 18, 1997, to show cause or answer petition for writ of habeas corpus (App., *infra*, 1-6);

District Court Order, entered January 27, 1998, adopting Final Report and Recommendation of United States Magistrate Judge (App. 7-13);

District Court Judgment, entered January 27, 1998, dismissing petition for writ of habeas corpus as untimely (App. 14);

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Court of Appeals Order, entered July 6, 1999, reversing judgment and remanding case (App. 34);

Court of Appeals Order, filed August 18, 1999, denying petition for rehearing and rejecting suggestion for rehearing en banc (App. 32-33);

District Court Order, filed September 8, 1999, spreading Court of Appeals mandate on record (App. 35);

District Court Order, filed September 17, 1999, to file answer or return to petition for writ of habeas corpus (App. 36-38);

District Court Order, filed October 15, 1999, denying without prejudice an application for stay of proceedings pending filing of petition for writ of certiorari (App. 39-40).

STATEMENT OF JURISDICTION

On July 6, 1999, the United States Court of Appeals for the Ninth Circuit entered judgment in this case. On August 18, 1999, the Ninth Circuit denied a petition for rehearing and rejected a suggestion for rehearing en banc.

The Ninth Circuit never had jurisdiction over this case. Before a federal habeas corpus petitioner can pursue an appeal from a district court's denial of relief in a § 2254 case, the petitioner must first obtain permission, via the issuance of a certificate of appealability (COA). See 28 U.S.C. § 2253 (c) (West 1999); Fed. R. App. P. 22 (West 1999). To obtain a COA, a § 2254 applicant must make "a substantial showing of the denial of a *constitutional* right." 28 U.S.C. § 2253 (c)(2) (emphasis added). Here, the issue which respondent (the habeas

petitioner) presented to the Ninth Circuit to be reviewed was whether the district court improperly ruled habeas corpus relief was precluded because the petition was not timely filed within the meaning of § 2244(d). Because that issue is not grounded in the Constitution, the Ninth Circuit did not have jurisdiction to accept respondent's appeal.

In turn, because respondent's "case" was never properly "in" the court of appeals, this Court lacks statutory certiorari jurisdiction under 28 U.S.C. § 1254(1), to resolve the merits of the period of limitations issue. However, this Court does have jurisdiction under § 1254(1) to make the preliminary jurisdictional determination of whether the COA issued in this case was issued improperly. *See Hohn v. United States*, 118 S. Ct. 1978 (1998).

If this Court determines the COA was properly issued in this case, this Court has jurisdiction to review the Ninth Circuit's judgment by writ of certiorari. 28 U.S.C. § 1254(1). The instant petition for writ of certiorari is timely because it is filed within ninety days of the August 18, 1999, order denying rehearing. 28 U.S.C. § 2101(c); S.Ct.R. 13.3.

STATUTORY PROVISIONS INVOLVED

Section 2244(d) of Title 28 of the United States Code provides:

> (d)(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of--
>
> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
>
> (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
>
> (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.
>
> (2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

Section 2253(c) of Title 28 of the United States Code provides:

> (c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from --

(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or

(B) the final order in a proceeding under section 2255.

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

STATEMENT OF THE CASE

On January 3, 1991, in a California superior court, respondent pled guilty to one count of second degree murder and admitted personally using a firearm during commission of the offense. On April 17, 1991, respondent was sentenced to state prison for a term of fifteen years to life, plus two years. Respondent did not appeal his conviction. (App. 9-10.)

On April 24, 1996, the President signed into law the Antiterrorism and Effective Death Penalty Act of 1996.

On March 4, 1997, respondent filed an original petition for writ of habeas corpus in the California Superior Court. On March 11, 1997, the petition was denied. (App. 29.)

On April 23, 1997, respondent filed an original petition for writ of habeas corpus in the California Court of Appeal. On May 1, 1997, the petition was denied. (App. 29.)

On May 20, 1997, respondent filed an original petition for writ of habeas corpus in the California Supreme Court. On August 27, 1997, the petition was denied. (App. 29-30.)

On September 15, 1997, respondent filed a petition for writ of habeas corpus in the district court. (App. 30.) The basis for the district court's jurisdiction was § 2254 of Title 28 of the United States Code (herein, all section references are to this Title). On January 27, 1998, the district court entered judgment dismissing the petition as untimely. (App. 14.)

On July 6, 1999, the Ninth Circuit filed an opinion reversing the judgment of dismissal and remanding the case. The court found the petition was timely filed because, pursuant to § 2244(d)(2), the intervals between one state court's denial of a petition and the prisoner's subsequent filing of a petition in another state court could not be counted toward the limitation period of §

2244(d)(1)(A). (App. 29.) On August 18, 1999, the Ninth Circuit denied rehearing and rejected a suggestion for rehearing en banc. (App. 32-33.)

REASONS FOR GRANTING CERTIORARI

On October 18, 1999, this Court ordered the parties in *Slack v. McDaniel*, No. 98-6322 to file supplemental briefs, in part, addressing the issue of whether a certificate of appealability may issue in a case where the district court ruled habeas corpus relief was unavailable for claims deemed to be second or successive and abusive. In *Slack*, the State of California filed an amicus curiae brief taking the position that a certificate of appealability could not be issued because the district court's denial of habeas corpus relief rested on non-constitutional grounds. Similarly here, the period of limitations issue was not properly the basis of a COA because it did not affect petitioner's constitutional rights as is required by 28 U.S.C. § 2253(c). If this Court holds in *Slack* that the denial of habeas corpus petitions on non-constitutional grounds may not form the basis of a § 2253(c) COA, certiorari should also be granted here.

If this Court finds in *Slack* that non-constitutional grounds may form the basis for a COA, certiorari is still warranted in this case. The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) imposes for the first time a limitation period within which a state prisoner must either file his application for federal habeas review of his state conviction or lose the right to file such an application. 28 U.S.C. § 2244(d)(1). As relevant in this case, the statute requires a state prisoner to file his federal application no later than one year after the date his conviction becomes final by the conclusion of direct review or expiration of the time for seeking direct review. § 2244(d)(1)(A). Not counted as part of that one year are any days on which "a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending . . . ." § 2244(d)(2).

In this case, the Ninth Circuit by published opinion determined that the limitation period "is tolled from the time the first state habeas petition is filed until the California Supreme Court rejects the petitioner's final collateral challenge." *Nino v. Galaza, et al.*, 183 F.3d 1003, 1006 (9th Cir. 1999). This ruling determines an important question of federal law because it permits, and requires, the federal courts to grant state prisoners virtually unlimited time in which to file their federal habeas applications. In other words, the Ninth Circuit now permits state prisoners to preclude any effect from the one-year deadline by the simple device of filing an unmeritorious state petition. The Ninth Circuit's decision governs the timeliness calculation of thousands of federal habeas petitions in nine states and provides other circuits with an interpretation of federal law which is clearly erroneous. For this reason, certiorari is warranted. S.Ct.R. 10(c).

In addition, the Ninth Circuit's opinion misinterprets the ordinary meaning of the words used in § 2244(d)(2), despite this Court's directives that statutory terms must be accorded their ordinary meaning. Thus, the Ninth Circuit has decided this important question of federal law in a manner conflicting with relevant decisions of this Court. For this reason, independently, certiorari is warranted. S.Ct.R. 10(c).

Finally, the Ninth Circuit's decision to interpret § 2244(d)(2) in such a manner expressly was based on an assertion that there would otherwise be a "need for federal action prompted by AEDPA's statute of limitations." *Nino v. Galaza, et al.*, 183 F.3d at 1005. This reason is not valid -- federal courts are not obligated to act to ensure that a state prisoner has some means to avoid full application of the limitation period which Congress and the President determined should apply to such a prisoner. The failure to properly apply the full effect to the AEDPA reflects a departure far from the

accepted and usual course of judicial proceedings, and independently warrants certiorari so this Court may exercise its supervisory power. S.Ct.R. 10(a).

ARGUMENT

I.

THE ISSUE OF WHETHER A STATE PRISONER'S FEDERAL HABEAS CORPUS PETITION IS TIMELY WITHIN THE MEANING OF 28 U.S.C. § 2244(D) CANNOT FORM THE BASIS OF A § 2253(C) CERTIFICATE OF APPEALABILITY BECAUSE THE ISSUE OF TIMELINESS DOES NOT AFFECT THE CONSTITUTIONAL RIGHTS OF THE PRISONER

Because the § 2254 application in this case was filed after April 24, 1996, the case is governed by the provisions of the AEDPA. *Lindh v. Murphy*, 521 U.S. 320, 117 S. Ct. 2059, 138 L. Ed. 2d 481 (1997). As such, prior to appealing the district court's denial of relief on timeliness grounds, respondent was obligated to obtain a COA by showing that the district court's denial of relief constituted a substantial denial of a constitutional right. 28 U.S.C. § 2253(c)(1)(2). The period of limitations in § 2244(d) is a statutory creation, and has no origins in the Constitution. Therefore, respondent was not entitled to a COA, and the Ninth Circuit was without jurisdiction to decide his appeal.[1/]

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1. It does not matter that petitioners did not challenge the improvidently issued COA in the Ninth Circuit. Section 2253 is a jurisdictional statute. *See Hohn*, 118 S.Ct. At 1975-76 (treating § 2253 as jurisdictional in nature and comparable to the jurisdictional prerequisite of filing a proper notice of appeal before the court of appeals may review the substance of the case); *id.* at 1980 (Scalia, J. dissenting, joined by Rehnquist, C.J., O'Conner, J., and Thomas J.) (same). An objection to subject matter jurisdiction cannot be waived, and may be raised at any time. *See e.g., Owen Equipment & Erection Co. v. Kroger*, 437 U.S. 365, 377 n.21, 98 S. Ct. 2396, 57 L. Ed. 2d 274 (1978); *Sosna v. Iowa*, 419 U.S. 393, 398, 95 S. Ct. 553, 42 L. Ed. 2d 532 (1975); *California v. LaRue*, 409 U.S. 109, 112 n.3, 93 S. Ct. 390, 34 L. Ed. 2d 342 (1972).

The issue of whether denials of habeas corpus relief on non-constitutional grounds, like untimeliness in § 2244(d), is currently pending before this Court in *Slack v. McDaniel*, No. 98-6322. Should this Court hold in *Slack* that the district court's denial of habeas corpus relief on non-constitutional grounds are not appealable, petitioners respectfully request that this case be remanded to the Ninth Circuit and that the Ninth Circuit be ordered to: (1) vacate its opinion in *Nino v. Galaza*, 183 F.3d 1003 (9th Cir. 1999); and (2) reconsider this matter in light of *Slack*.

II.

SINCE NO "APPLICATION" IS "PENDING" BETWEEN THE DISPOSITION OF ONE STATE APPLICATION AND THE FILING OF A SUBSEQUENT STATE APPLICATION, THAT PERIOD OF TIME MUST BE COUNTED IN THE AEDPA'S ONE-YEAR LIMITATION PERIOD

The ordinary meaning of the terms used in § 2244(d)(2) permits a court to exclude, from the one-year limitation period for a state prisoner to file a federal habeas petition, only such days that the prisoner has an application for post-conviction or other collateral relief on file with and awaiting decision from a state authority empowered to grant relief. The Ninth Circuit refused to accord such ordinary meaning to the terms, and in a published decision required the district courts to exclude from the limitation period days on which the state prisoner had no such application on file and awaiting decision from a California authority. In doing so, the Ninth Circuit decided an important question of federal law in a manner conflicting with this Court's relevant decisions.

Further, the Ninth Circuit reached its decision in partial reliance on a premise that otherwise the federal courts would be compelled to find some device to allow state prisoners not to be affected by the newly-enacted limitation period. The Ninth Circuit thereby departed far from the accepted and usual course of judicial proceedings.

For these reasons, certiorari is warranted.

A. By Construing § 2244(d)(2) In A Manner Which Effectively Undercuts The Limitation Period, The Ninth Circuit Decided An Important Question Of Federal Law Which Has Not Been Settled, But Should Be Settled, By This Court

The importance of the question of federal law is demonstrated by the extreme contrast in results which flow from the interpretation which petitioners give § 2244(d)(2) and the results which flow from the Ninth Circuit's interpretation. Petitioners submit the proper reading of the statute is that Congress and the President intended to provide the states with a finite and readily-identifiable time certain after which the states could be assured that their prisoners would be precluded from claiming, via federal habeas corpus, that the states are illegally restraining the prisoners.

This intent is fulfilled by reading 28 U.S.C. § 2244(d)(2) as providing that no more than 365 days may pass between the date of finality of the conviction in state court and the filing of the prisoner's federal application, excluding solely those days on which all the following are true: (1) there exists a completed application, (2) the application is one asking the State to grant some form of collateral or other postconviction relief from the judgment (e.g., a clemency application to the Governor or a petition for writ of habeas corpus), (3) the application has been filed with a State authority, (4) the filing was proper, i.e., it was filed in accord with the State's filing requirements and filed with a State authority with jurisdiction to grant the requested relief, and (5) that particular application is yet pending, i.e., there still remains the legal possibility under State law that relief will be granted pursuant to that particular application.

So interpreted, § 2244(d)(2) compels a state prisoner to act diligently in seeking federal review because the only passage of time not counted against him is that passage of

time over which he has no control, i.e., the time between the filing of his state application and the ruling on the application. Under this interpretation, state prisoners who find 365 days insufficient to account for the simple preparation and mailing of their state collateral and postconviction applications would simply be barred from federal court.

In contrast, under the Ninth Circuit's reading of the statute, a state prisoner may easily avoid compliance with the limitation period. This is so because the Ninth Circuit incorrectly focused solely on (1) the date of the filing of the initial state habeas application and (2) the date the California Supreme Court denied a later, "final collateral challenge" on the merits. *See Nino v. Galaza, et al.*, 183 F.3d at 1006 & n.4. Thus, if *Nino v. Galaza, et al.* stands, state prisoners may easily frustrate Congress's one-year limitation period by simply: (1) waiting until 364 days have elapsed from the finality of their convictions in state court and then (2) filing unmeritorious and time-consuming collateral attacks in state court.

Moreover, apart from frustrating Congressional intent, a California prisoner who believes he will benefit from delayed presentation of his federal claim in federal court can accomplish that goal as easily as he could prior to AEDPA's enactment. For example, a California prisoner who on direct review unsuccessfully challenges his conviction on the ground that his confession was unlawfully admitted (*Miranda* v. *Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966)) can greatly delay presentation of that claim in federal court to forestall the possibility that a *speedy* retrial will again result in his conviction (with or without the confession).

The prisoner need only promptly file a habeas petition in state court asserting some unmeritorious challenge, e.g., that he was not appointed counsel at trial. After the state court speedily rejects that claim, the prisoner can wait and do nothing until enough time passes

-- years if necessary -- while witnesses may become unavailable and the evidence becomes lost or stale. Then, under the *Nino* rule, the prisoner can assure the timeliness of a federal petition merely by raising some additional unmeritorious challenge in a habeas petition filed in the California Supreme Court, e.g., he may allege that on the day before the filing, he heard another person confess to committing the crime for which the prisoner stands convicted. *See Herrera v. Collins*, 506 U.S. 390, 411 & n.11, 113 S.Ct. 853, 122 L.Ed.2d 203 (1993) (observing that California and eight other states permit at any time a collateral challenge on the state-law ground of newly-discovered evidence).

Under the *Nino* rule, with this simple procedure the prisoner has guaranteed that he can now file a federal habeas petition and have it deemed timely -- even if the *sole* claim raised in the federal petition is the *Miranda* claim which was exhausted on direct review years before.

Since the rule announced in *Nino v. Galaza, et al.*, is inconsistent with Congress's intent to impose a strict one-year limitation on federal habeas corpus review, it presents an important federal question. In addition, the importance of the question is heightened in the Ninth Circuit and several other circuits which have habeas jurisdiction over states (at least twenty) that have the grace to account for the possibility that crucial new evidence will not surface until years after the conviction, *see Herrera v. Collins,* 506 U.S. at 410-11 n.10 & n.11. S.Ct.R. 10(c).

B. By Refusing To Give The Terms Used In § 2244(d)(2) Their Ordinary Meaning, The Ninth Circuit Determined The Important Federal Question In A Manner Which Conflicts With This Court's Relevant Decisions

This Court has held that a federal court, in construing a statute, must accord the terms used their "ordinary" meaning. *Moskal v. United States*, 498 U.S. 103, 108, 111 S.Ct. 461, 112 L.Ed.2d 449 (1990); *Richards v. United States*, 369 U.S 1, 9, 82 S.Ct. 585, 7 L.Ed.2d 492 (1962); *Green v. Biddle*, 21 U.S (8 Wheat.) 1, 89-90 (1821). *Nino*'s interpretation of the AEDPA is inconsistent with this rule.

The relevant language is this: "The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection." § 2244(d)(2). The ordinary meaning of the terms used is indeed clear, and is contrary to the meaning which the Ninth Circuit accorded the subsection.

By requiring that a "properly filed application" be "pending" on any day excluded from the time calculation, the statute expressly prevents a federal court from excluding from the calculation any day on which there was no actual application on file with, and awaiting action from, some state authority. Thus, according to the ordinary meaning of the terms, any day on which no California authority has before it a live application, on which it could conceivably grant relief, must be counted in the one-year limitation period. The language of the statute makes no reference to, and therefore deems irrelevant, whether a prior application has been denied, whether a future application may be filed, or whether for any reason the prisoner might conceivably be deemed in the midst of exhaustion of federal constitutional claims.

The Ninth Circuit declined to adopt the above-referenced interpretation on the ground that during the intervening periods, the California prisoner arguably could be deemed to be "attempting to exhaust his claims in state court." *Nino v. Galaza, et al.*, 183 F.3d at 1005. But, the ordinary meaning of the terms used in the statute is more precise, and the rule of the statute is accordingly more restrictive. The statute plainly and simply is triggered solely by the current pendency of an actual "application" which *is* -- and not possibly *will be* -- on file with and awaiting action from some California authority. The Ninth Circuit's exhaustion theory conflicts with the plain language of the statute -- language which permits exclusion only of days on which an application is still on file with and awaiting action by some state authority.

The Ninth Circuit also opined the *Nino* rule is appropriate because, without such a rule, the law would force federal courts to engage in the "'"unseem[liness]" of . . . overturning a state court conviction without the state courts having had an opportunity to correct the constitutional violation in the first instance.'" *Nino v. Galaza, et al.*, 183 F.3d at 1007, quoting *O'Sullivan v. Boerckel*, 119 S.Ct. 1728, 1732, 144 L.Ed.2d 1 (1999). That, however, is erroneous. Entirely independent of § 2244(d)(2), federal law already denies federal courts the power to engage in such unseemliness absent the express written consent of the attorney for the state. *See* § 2254(b) (state prisoner must first exhaust available state remedies in order to be granted federal habeas relief; a state cannot waive the exhaustion requirement unless it does so expressly).

And, the Ninth Circuit appears to support its interpretation of the AEDPA by implying that a "case" is pending once an initial habeas petition is filed in a lower California court -- even after the lower court has entered an unappealable order denying that petition -- so long as the prisoner will be filing a subsequent original petition in

a higher state court. *See Nino v. Galaza, et al.*, 183 F.3d at 1006 & n.2. However, even if such a "case" were pending, that would be irrelevant; § 2244(d)(2) refers to the pendency of an "application," and not to the theoretical pendency of a "case."

In sum, the Ninth Circuit decided this important question of federal law by misapplying the terms used in section 2244(d)(2), and thereby decided the question in a manner which conflicts with this Court's relevant decisions. For this reason, too, certiorari is warranted. S.Ct.R. 10(c).

C. The Ninth Circuit Based Its Decision, In Part, On A Mistaken Premise That The *Nino* Rule Was Necessary To "Obviate The Need For Federal Action Prompted By The AEDPA's Statute Of Limitations"

The Ninth Circuit expressly stated one reason for its reading of § 2244(d)(2) was that such a reading "obviates the need for federal action prompted by AEDPA's statute of limitations." *Nino v. Galaza, et al.*, 183 F.3d at 1005. The Ninth Circuit was wrong.

The limitation period set forth in the AEDPA cannot properly, under any circumstance, "prompt" "federal action" on the part of a federal court -- at least not any action which would benefit state prisoners. The unmistakable and consistent intent of AEDPA is to increase the circumstances in which a state prisoner is denied habeas relief from federal courts, whether as a matter of a denial of claims on the merits (§ 2254(d)) or by outright preclusion from federal court altogether on timeliness grounds (§ 2244(d)). It is the duty of the federal courts simply to enforce that will, not to find some means of ameliorating it, e.g., by allowing the filing of premature (i.e., "protective") filings in federal court when a state prisoner simply fails to commence exhaustion of his state remedies in time to account for the inevitable

delays which occur during such exhaustion. *See Nino v. Galaza, et al.*, 183 F.3d at 1005 & 1007 (implying federal courts must accept such filings to ensure a state prisoner will not run out of time if further filings in state court are necessary to exhaust his claims).

This is an appropriate case in which this Court can and should exercise its supervisory role. This Court should not postpone consideration of this issue until the *Nino* rule becomes entrenched and numerous state prisoners have inappropriately avoided the AEDPA's one-year limitation period. The delay which traditionally accompanied state prisoners' federal habeas applications prior to the AEDPA may have new life after *Nino v. Galaza, et al.* Moreover, scores of prisoners doubtless would ask the Ninth Circuit to find that their prior delay in reliance on the *Nino* rule constituted good cause to "equitably" toll the limitation period with respect to their ultimate filing of untimely federal petitions. This Court's immediate supervision is needed to end the problem now. S.Ct.R. 10(a).

CONCLUSION

If this Court holds in *Slack* that the district court's denial of habeas corpus relief on non-constitutional grounds is not appealable, petitioners respectfully request that this case be remanded to the Ninth Circuit and that the Ninth Circuit be ordered to: (1) vacate its opinion in *Nino v. Galaza*, 183 F.3d 1003 (9th Cir. 1999); and (2) reconsider this matter in light of *Slack*.

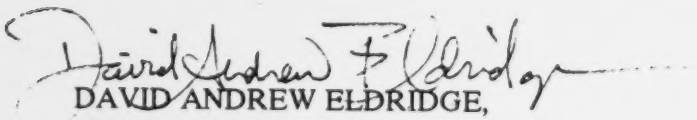
If this Court finds non-constitutional orders are appealable and therefore the Ninth Circuit properly entertained jurisdiction over respondent's appeal, petitioners respectfully ask this Court to: (1) grant certiorari, (2) hold that a federal court may not exclude from AEDPA's limitation period those days on which a

state prisoner has no application for postconviction or other collateral review actually on file with and awaiting decision from any California authority, (3) reverse the judgment of the Ninth Circuit and order the petition for writ of habeas corpus dismissed with prejudice as untimely filed, and (4) make such further order as this Court deems just. In the alternative, petitioners specifically ask this Court to invoke its power to grant certiorari to summarily reverse and vacate the opinion of the Ninth Circuit, and to remand for reconsideration in light of this Court's prior decisions dictating that a statute must be construed by according the ordinary meaning to the terms used in the statute.

Dated: November 16, 1999.

Respectfully submitted,

BILL LOCKYER, Attorney General
of the State of California
DAVID P. DRULINER, Chief
Assistant Attorney General
CAROL WENDELIN POLLACK, Senior
Assistant Attorney General
SANJAY T. KUMAR, Supervising
Deputy Attorney General



DAVID ANDREW ELDRIDGE,
Deputy Attorney General
Counsel of Record

Counsel for Petitioners

DAE:ea
LA1998FA0040

APPENDIX

Entered Sep. 18 1997

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

JESUS NINO, Petitioner, vs. GEORGE GALAZA, Warden, et al., Respondents.	)	Case No. CV 97-6831-WDK(RC) ORDER TO SHOW CAUSE OR ANSWER PETITION FOR WRIT OF HABEAS CORPUS

IT IS HEREBY ORDERED:

1. The Clerk of the Court shall promptly serve by certified mail a copy of the Petition and this Order on respondent by delivering them to the **Attorney General of the State of California**, as required by Rule 4, Rules Governing Section 2254 Cases in the United States District Courts, and upon **petitioner**.

2. Respondent(s) shall file and serve an **answer(s)** or **return** to the petition within sixty (60) days after the filing date of this Order. The answer(s) shall respond to the allegations in the petition and, at a minimum, address the following:

A. Whether petitioner is in respondent's custody;

B. The cause of petitioner's detention (e.g., pretrial or post-conviction detention, type of judgment, court name and case no.), and indicate what transcripts, if any, are available and when they can be furnished;

C. Whether respondent(s) concedes that the petition should be granted. If respondent disputes any claim raised in the petition, and does not concede that the petition should be granted, then he shall address the merits of each disputed claim and the necessity for an evidentiary hearing to resolve any issue, **and shall lodge with the Court all state records** pertinent to each disputed claim.

D. If respondent(s) contends that petitioner has failed to exhaust an administrative remedy as to any ground for relief alleged in the petition, respondent shall specify the administrative remedies still available to petitioner.

3. If petitioner desires to file a **traverse** or **response** to the answer, he shall do so within sixty (6) days of the date the answer is served. The traverse or response shall set forth, separately:

A. Petitioner's admission or denial of each factual allegation in the answer;

B. Additional facts or legal argument responsive to matters raised in the answer; and

C. Shall not raise new grounds for relief not asserted in the petition.

4. Unless the Court orders otherwise, the case will be deemed **submitted** on the records on file thirty (30) days after the traverse is filed or, in the event no traverse is filed, thirty (30) days after the answer(s) is filed.

DATE: Sept. 18, 1997

/s/
ROSALYN M. CHAPMAN
UNITED STATES
MAGISTRATE JUDGE

Service List:

Jesus Nino
C.D.C. # E 95209
P.O. Box 3461
Corcoran, CA 93212

California Office of the
Attorney General
300 S. Spring St.
Suite 500
Los Angeles, CA 90013

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9/17/97

Entered Sep. 18, 1997

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

JESUS NINO, Petitioner, vs. GEORGE GALAZA, Warden, et al., Respondents.	Case No. CV 97-6831-WDK(RC) PROCEDURAL ORDER

IT IS HEREBY ORDERED:

1. All future pleadings shall have the above case number and shall be filed with Ms. Debra Taylor-Spears, Clerk of Court, United States Courthouse, 312 N. Spring Street, Los Angeles, CA 90012.

2. All pleadings to be filed shall comply with the Federal Rules of Civil Procedures and the Local Rules of the

United States District Court for the Central District of California.

3. All pleadings to be filed shall:

A. At the top of page 1 of the pleadings, state the party's name and mailing address (including any prisoner number or dorm, wing or building number) to assure mail will be delivered to him/her. During the pendency of the action, any party must notify the Court immediately if his/her address changes and provide the Court with the new address and its effective date. Any failure by a party to comply with a Court Order the party did not receive the order due to his/her failure to inform the Court of his/her current address may result in the action being dismissed for petitioner's failure to prosecute (Carey v. King, 856 F.2d 1439, 1440-1441 (9th Cir. 1988));

B. Shall be legibly written or typed;

C. Shall be on only one (1) side of each page;

D. Shall be submitted with one (1) original document and one (1) copy or, if a party wishes to receive a conformed copy, one (1) original and two (2) copies;

E. Shall have at least a one (1) inch margin at the top of each page so that the document can be hole punched and properly bound in the court file; and court file; and

F. Shall be paged consecutively to facilitate ease of reference, including exhibits and attachments.

4. Strict compliance with Local Rule 5.8 regarding proof of service shall be required. Any pleading or other document submitted to the Clerk of the Court for filing

shall include a certificate of service upon the opposing party or his/her counsel. Otherwise, the pleading or document will not be filed, and will be disregarded by the Court and returned to the submitting party.

DATE: Sept. 18, 1997

/s/
ROSALYN M. CHAPMAN
UNITED STATES
MAGISTRATE JUDGE

Service List:

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9/17/97

FILED
JAN 23 1998

ENTERED
JAN 27 1998

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

JESUS NINO, Petitioner, vs. GEORGE GALAZA, Warden, et al., Respondents.	)	Case No. CV 97-6831-WDK(RC) ORDER ADOPTING FINAL REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

Pursuant to 28 U.S.C. Section 636, the Court has reviewed the Petition and other papers along with the attached Final Report and Recommendation of United States Magistrate Judge Rosalyn M. Chapman, and has made a de novo determination.

IT IS ORDERED that (1) the Final Report and Recommendation is approved and adopted; (2) the Final Report and Recommendation is adopted as the findings

of fact and conclusions of law herein; and (3) Judgment shall be entered dismissing the petition and action as untimely.

IT IS FURTHER ORDERED that the Clerk shall serve copies of this Order, the Magistrate Judge's Final Report and Recommendation and Judgment by the United States mail on petitioner and counsel for respondents.

DATED: 1/23/98

/s/
WILLIAM D. KELLER
UNITED STATES DISTRICT JUDGE

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1/20/98

FILED
JAN 20 1998

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

JESUS NINO,	)	Case No. CV 97-6831-WDK(RC)
Petitioner,	)	
vs.	)	FINAL REPORT AND RECOMMENDATION ON STATE HABEAS PETITION
GEORGE GALAZA, Warden, et al.,	)	
Respondents.	)	

This Final Report and Recommendation is submitted to the Honorable William D. Keller, United States District Judge, pursuant to the provisions of 28 U.S.C. § 636 and General Order 194 of the United States District Court for the Central District of California.

BACKGROUND

I

On January 3, 1991, petitioner Jesus Nino, in the Superior Court for the County of Los Angeles, pleaded guilty to, and was convicted of, second degree murder, in violation of California Penal Code Section 187, and petitioner also admitted that he personally used a firearm

in committing the murder. Petition at 3; Motion to Dismiss ("Motion"), Exh. A. On April 17, 1991, the petitioner was sentenced to seventeen years to life. Petition at 3.[2/] The petitioner did not appeal his conviction.

However, almost six years later, on March 4, 1997, petitioner filed a petition for writ of habeas corpus in the Los Angeles Superior Court, which was denied eight days later on March 11, 1997. On April 23, 1997, the petitioner filed a habeas corpus petition in the California Court of Appeal, which was denied nine days later on May 1, 1997. On May 26, 1997, petitioner filed a habeas corpus petition in the California Supreme Court, which was denied 93 days later, on August 27, 1997. Motion, Exhs. D and E. The petitioner's state habeas corpus petitions pended for a total of 110 days.

II

On September 15, 1997,[3/] petitioner filed the instant petition for writ of habeas corpus challenging his conviction. In the petition, petitioner raises the claims that: (1) his guilty plea was invalid and unconstitutional in that he was not made aware of the direct consequences of the plea; (2) he was denied his due process right when the trial court violated the plea agreement; and (3) trial counsel denied petitioner his Sixth and Fourteenth Amendment rights when misadvising petitioner of the sentence he would receive and in failing to move for withdrawal of the guilty plea. Petitioner at 3-4.

---

2. The respondents are admonished for not providing court documents establishing the sentencing of petitioner.

3. The petition is dated September 2, 1997, and has a "declaration of service" dated September 9, 1997.

On November 4, 1997, respondents filed a motion to dismiss the petition for writ of habeas corpus, with supporting memorandum of points and authorities and exhibits. In their motion to dismiss, respondents contend that the instant petition is time barred by the one year statute of limitations enacted as part of the Antiterrorism Effective Death Penalty Act of 1996. The petitioner filed his opposition to the motion to dismiss on December 5, 1997.

On December 23, 1997, Magistrate Judge Rosalyn M. Chapman issued a Report and Recommendation recommending that the instant petition and action be dismissed as untimely. On January 12, 1998, petitioner filed his objections to the Report and Recommendation, arguing that it failed to consider that the statute of limitations was tolled for the period during which petitioner's state habeas corpus petitions were pending. The Court, having considered petitioner's objections, now issues the Final Report and Recommendation, which also recommends that the instant petition and action be dismissed as untimely.

DISCUSSION

The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA),[4] effective April 24, 1996, worked substantial changes to the law of habeas corpus. Moore v. Calderon, 108 F.3d 261, 263 (9th Cir.), cert. denied, 117 S.Ct. 2497 (1997). Of specific importance to the petitioner's claims are the revisions made to 28 U.S.C. § 2244(d), which now provides:

---

4. Pub. L. No. 104-132, 110 Stat. 1214.

> (1) A 1-year period of limitation shall apply to an application for writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of - -
>
> (A) the date on which the judgment became final by the conclusion of direct review or the expiration time for seeking such review;
>
> (B) * * *
>
> (C) * * *
>
> (D) * * *
>
> (2) The time during which a properly filed application for state post-conviction or other collateral review with respect to the pertinent judgment is pending shall not be counted toward any period of limitation under this subsection.

Here, the petitioner never appealed his 1991 conviction to the California Court of Appeal or sought review from the California Supreme Court. Any direct review available to petitioner expired more than six years ago. The Ninth Circuit has held, however, that the AEDPA's one year statute of limitations did not begin to run against any state prisoner prior to the date of the AEDPA's enactment. Calderon v. United States District Court (Beeler), 128 F.3d 1283, 1287 (9th Cir. 1997); see also Lindh v. Murphy, ___ U.S. ___, 117 S.Ct. 2059, 2068, 138 L.Ed.2d 481 (1997) (applying AEDPA only to cases filed after its effective date). Thus, a state prisoner whose state court review process has been, or should have been, completed before the effective date of the AEDPA had one year from April 24, 1996, or until April 23, 1997, to file a federal habeas corpus petition.

Assuming arguendo that the statute of limitations was tolled while petitioner's habeas corpus petitions were

pending in the state courts, the statute of limitations was tolled for a total of 110 days, which when added to the filing deadline of April 23, 1997, means that the statute of limitations expired on August 18, 1997. The instant petition was not filed by that date and, thus, is not timely. The petitioner argues, however, that this cannot be the case because he did not exhaust his state court remedies until August 27, 1997 - - after the statute of limitation had run. This is true; however, there is nothing in the AEDPA that ties its tolling provisions to the requirement of exhaustion of state court remedies. The petitioner had one whole year after the passage of AEDPA to exhaust his state court remedies, and he failed to do so; in fact, he waited until March 4, 1997, to begin the exhaustion process. The petitioner's delay in seeking state court habeas corpus relief in inexplicable, and the petitioner has offered no reason or explanation for his failure to file his state habeas corpus petitions in sufficient time to exhaust state court remedies before the running of the statute of limitation under AEDPA.

RECOMMENDATION

For the foregoing reasons, IT IS RECOMMENDED that the Court issue and Order: (1) approving and adopting this Final Report and Recommendation; (2) adopting the Final Report and Recommendation as the findings of fact and conclusions of law herein; and (3) entering Judgment dismissing the habeas corpus petition and action as untimely.

DATE: January 20, 1998 /s/
ROSALYN M. CHAPMAN
UNITED STATES
MAGISTRATE JUDGE

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1/20/98

FILED
JAN 23 1998

ENTERED
JAN 27 1998

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

JESUS NINO,	)	Case No. CV 97-6831-WDK(RC)
Petitioner,	)	JUDGMENT
vs.	)	
GEORGE GALAZA, Warden, et al.,	)	
Respondents.	)	

Pursuant to the Order of the Court adopting the findings, conclusions, and recommendations of United States Magistrate Judge Rosalyn M. Chapman,

IT IS ADJUDGED that the Petition for Writ of Habeas Corpus and action are dismissed as untimely.

DATE: 1/23/98

/s/
WILLIAM D. KELLER
UNITED STATES DISTRICT JUDGE

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ENTERED
FEB 23 1998

FILED
FEB 19 1998

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

JESUS NINO,	)	Case No. CV 97-6831-WDK(RC)
Petitioner,	)	
vs.	)	ORDER DENYING PETITIONER'S MOTION TO AMEND OR ALTER THE JUDGMENT
GEORGE GALAZA, Warden, et al.,	)	
Respondents.	)	

On January 27, 1998, Judgment was entered dismissing the habeas corpus petition and action as untimely. On February 10, 1998, petitioner filed a Motion for Reconsideration, citing in the caption Fed. R. Civ. P. 60.

Rule 60 provides for relief from a judgment or order due to (a) clerical error or (b) mistake, inadvertence, excusable neglect, new discovered evidence, fraud, or the like. Here, petitioner has shown no mistake, inadvertence, or anything else coming within the meaning of Rule 60, which would warrant relief from the judgment; rather, he merely remakes the arguments he previously made. The

petitioner's Motion to Amend or Alter the Judgment is, thus, DENIED WITH PREJUDICE.

DATE: 2/19/98

/s/
WILLIAM D. KELLER
UNITED STATES DISTRICT JUDGE

PRESENTED BY:

DATE: February 13, 1998

/s/
ROSALYN M. CHAPMAN
UNITED STATES MAGISTRATE JUDGE

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2/13/98

FILED
MAR 17 1998

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

JESUS NINO, Petitioner, vs. GEORGE GALAZA, Warden, et al., Respondents.	)	Case No. CV 97-6831-WDK(RC) ORDER DENYING CERTIFICATE OF APPEALABILITY

On March 4, 1998, the petitioner filed a Notice of Appeal to the Ninth Circuit following dismissal of his habeas corpus action. The Court adopted the Magistrate Judge's Final Report to Recommendation dismissing the habeas corpus petition and the action on January 23, 1998, and Judgment was entered on January 27, 1998.

DISCUSSION

The petitioner filed his habeas corpus petition on March 5, 1997, after the effective date of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). Under the AEDPA, there is a one-year statute of limitations for the filing of a habeas corpus

petition by a person in custody. 28 U.S.C. §2244(d). The statute of limitations, however, is tolled for the time during which properly filed applications for state post-conviction or other collateral review are pending. Id. Despite tolling the statute of limitations for the appropriate periods, the instant petition was not timely filed.

The Court finds that the appeal is not taken in good faith, and that petitioner has not made a substantial showing that he has been denied a constitutional right, for the reasons set forth in the Final Report and Recommendation of the United States Magistrate Judge, and accordingly, a certificate of appealability should not issue under 28 U.S.C. § 2253(c)(2) and Fed. R. App. P. 22(b). See also Barefoot v. Estelle, 463 U.S. 880, 893, 103 S.Ct. 3383, 77 L.Ed.2d 1090 (1983).

ORDER

IT IS ORDERED that a Certificate of Appealability be DENIED.

DATE: 3/17/98 /s/
WILLIAM D. KELLER
UNITED STATES DISTRICT JUDGE

PRESENTED BY:
DATE: March 12, 1998

/s/
ROSALYN M. CHAPMAN
UNITED STATES MAGISTRATE JUDGE
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3/12/98

FILED
APR 30 1998
CATHY A. CATTERON, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JESUS NINO,	)	No. 98-55563
	)	
	)	DC# CV-97-6831-WDK
Petitioner,	)	Central California
	)	
vs.	)	ORDER
	)	
GEORGE GALAZA, Warden, et al.,	)	
	)	
Respondents.	)	
	)	

Before: BRUNETTI, RYMER and T.G. NELSON, Circuit Judges

The request for certificate of appealability is denied.

See 28 U.S.C. § 2244(d)(1).

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FILED
AUG 19 1998
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JESUS NINO,	)	No. 98-55563
	)	
Petitioner-Appellant,	)	DC# CV-97-6831-WDK
	)	Central California
	)	
vs.	)	ORDER
	)	
GEORGE GALAZA, Warden, et al.,	)	
	)	
	)	
Respondents-Appellees.	)	
	)	

Before: BRUNETTI, RYMER and T.G. NELSON, Circuit Judges

The petition for hearing en banc is construed as a motion for reconsideration and a suggestion for rehearing en banc of the court's April 30, 1998 order denying a certificate of appealability. So construed, the motion for reconsideration is granted and the suggestion for rehearing en banc is rejected. See Gen. Ord. 6.11 (panel may reject suggestion on behalf of court).

The request for certificate of appealability is granted with respect to the following issue: whether the district

court erred by dismissing the 28 U.S.C. section 2244 petition as untimely. See 28 U.S.C. § 2254(d)(2).

Appellant is granted leave to proceed in forma pauperis.

Appellant's opening brief is due September 21, 1998; appellees' brief is due October 21, 1998; the optional reply brief is due within 14 days after service of appellee's brief.

Because appellant is a prisoner proceeding in forma pauperis and is not represented by counsel, appellant is not required to filed excerpts of record. See 9th Cir. R. 24-1.

Because there were no hearings in the district court, the clerk of that court shall forward the Certificate of Record immediately. See 9th Cir. R. 11-2.

misc/7.98/98.55536(ka)

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JESUS NINO,
Petitioner-Appellant,
v.
GEORGE GALAZA, Warden;
ATTORNEY GENERAL OF THE STATE OF CALIFORNIA,
Respondents-Appellees.

No. 98-55563
D.C. No. CV-97-06831-WDK
OPINION

Appeal from the United States District Court
for the Central District of California
William D. Keller, District Judge, Presiding

Submitted June 7, 1999[1]
Pasadena, California

Filed July 6, 1999

Before: James R. Browning, Sidney R. Thomas, and Kim McLane Wardlaw, Circuit Judges.

Opinion by Judge Thomas

SUMMARY

Criminal Law and Procedure/Habeas Corpus

The court of appeals reversed a judgment of the district court. The court held that the Antiterrorism and Effective

[1]The panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

Death Penalty Act of 1996 (AEDPA) statute of limitations is tolled for all of the time during which a state prisoner is attempting, through proper use of state court procedures, to exhaust state court remedies with regard to a particular post-conviction application.

Appellant state prisoner Jesus Nino filed his first petition for collateral state post-conviction relief in the Los Angeles Superior Court on March 4, 1997. On March 11, 1997, the Los Angeles Superior Court denied Nino's first petition. On April 23, 1997, he filed a habeas petition in the California Court of Appeals; that petition was denied on May 1, 1997. On May 20, 1997, he filed a petition with the California Supreme Court, which was denied on August 27, 1997. Nino filed his federal habeas petition on September 15, 1997.

The district court dismissed Nino's federal habeas petition as untimely.

Nino appealed.

[1] Under the AEDPA, a state prisoner must fully and fairly present his claims to state courts before seeking federal habeas relief. [2] In furtherance of Congress's desire to accelerate the federal habeas process AEDPA also imposed a one-year statute of limitations on the filing of a federal habeas corpus petition by a state prisoner.

[3] AEDPA provides that the statute of limitations is tolled during the time that a state prisoner is attempting to exhaust his claims in state court. Section 2244(d)(2) states that the time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

[4] The question presented was whether AEDPA's statute of limitations remains tolled during the intervals between the

state court's disposition of a state habeas petition and the filing of a petition at the next state appellate level.

[5] The AEDPA statute of limitations is tolled for all of the time during which a state prisoner is attempting, through proper use of state court procedures, to exhaust state court remedies with regard to a particular post-conviction application.

[6] Applying these principles to California's post-conviction procedure, the statute of limitations is tolled from the time the first state habeas petition is filed until the California Supreme Court rejects the petitioner's final collateral challenge. AEDPA's statute of limitations is not tolled from the time a final decision is issued on direct state appeal and the time the first state collateral challenge is filed because there is no case "pending" during that interval.

[7] Because the statute of limitations was tolled during the period in which Nino was properly pursuing his state post-conviction remedies, the district court erred in dismissing Nino's federal habeas petition as untimely.

COUNSEL

Jesus Nino, Corcoran, California, pro se, for the petitioner-appellant.

David Andrew Eldridge, Deputy Attorney General, Los Angeles, California, for the respondents-appellees.

OPINION

THOMAS, Circuit Judge:

In this appeal, we are asked to decide whether the time tolled for exhaustion of state remedies pursuant to 28 U.S.C.

§ 2244(d) includes the interval between the disposition of an appeal or post-conviction petition and the filing of an appeal or successive petition at the next state appellate level. We conclude that, for purposes of § 2244(d), the time must be tolled for the entire period in which a petitioner is appropriately pursuing and exhausting his state remedies. Accordingly, we reverse the district court's dismissal of petitioner's habeas corpus petition as untimely.

I

[1] One of the most venerable doctrines in federal habeas corpus jurisprudence is that a state prisoner must fully and fairly present his or her claims to state courts before seeking federal habeas relief. *See Ex parte Hawk*, 321 U.S. 114, 116-17 (1944); *Ex parte Royall*, 117 U.S. 241, 252-53 (1886). The rule was first codified in 1948, *see Felker v. Turpin*, 518 U.S. 651, 662 n.4 (1996), and adopted in its present form by Congress in the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), *see* 28 U.S.C.A. § 2254(b)(1) (West Supp. 1999).

The exhaustion requirement is "grounded in principles of comity." *Coleman v. Thompson*, 501 U.S. 722, 731 (1991). It is "principally designed to protect the state courts' role in the enforcement of federal law and prevent disruption of state judicial proceedings." *Rose v. Lundy*, 455 U.S. 509, 518 (1982). The Supreme Court has assiduously applied and expanded the exhaustion principle. *See, e.g., O'Sullivan v. Boerckel*, 119 S. Ct. 1728, 1729-30 (1999) (holding that a state prisoner must exhaust discretionary state post-conviction remedies before seeking federal habeas relief); *Rose*, 455 U.S. at 522 (holding that federal courts must generally dismiss petitions containing both exhausted and unexhausted claims).

[2] In addition to supplanting prior statutory exhaustion requirements, AEDPA imposed limits on the time in which a state prisoner could file a federal habeas petition. Previously,

aside from certain prudential considerations, a petitioner had "almost unfettered discretion" in deciding when to file his federal petition. *Calderon v. United States Dist. Ct. (Beeler)*, 128 F.3d 1283, 1286 (9th Cir. 1997), *overruled on other grounds by Calderon v. United States Dist. Ct. (Kelly)*, 163 F.3d 530 (9th Cir. 1998), *cert. denied*, 119 S. Ct. 1377 (1999). In furtherance of "Congress's desire to accelerate the federal habeas process," *Beeler*, 128 F.3d at 1289, AEDPA imposed a one-year statute of limitations on the filing of a federal habeas corpus petition by a state prisoner, *see* 28 U.S.C.A. § 2244(d)(1) (West Supp. 1999). The one-year limitations period begins to run from the latest of:

> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
>
> (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
>
> (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

§ 2244(d)(1)(A-D).

[3] Further, AEDPA provides that the statute of limitations is tolled during the time that a state prisoner is attempting to exhaust his claims in state court. Section 2244(d)(2) states

that "[t]he time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection."

[4] The decisive factor in this case in determining whether Nino's federal petition was timely filed is whether AEDPA's statute of limitations remains tolled during the intervals between the state court's disposition of a state habeas petition and the filing of a petition at the next state appellate level. Deciding that question requires construction of when an application for state post-conviction or collateral review is "pending."

To date, only one other circuit court has squarely faced the issue. In concluding that applying tolling during these periods was consistent with the principle of total exhaustion, the Tenth Circuit held that AEDPA's statute of limitations was tolled for "all of the time during which a state prisoner is attempting, through proper use of state court procedures, to exhaust state court remedies with regard to a particular post-conviction application." *Barnett v. Lemaster*, 167 F.3d 1321, 1323 (10th Cir. 1999). Although not directly faced with the question, the Eleventh Circuit has also tolled all of the time during which a § 2254 petitioner exhausted his claims in state court. *See Guenther v. Holt*, Nos. 98-6296, 98-6297, 1999 WL 246649, at *2 (11th Cir. April 27, 1999) (tolling the statute of limitations from the time petitioner filed his state post-conviction petition in Alabama circuit court until the time the Alabama Supreme Court denied certiorari).

We agree with the Tenth and Eleventh Circuits. A contrary construction would be antithetical to the entire theory of state remedy exhaustion and would inevitably lead to the filing of protective federal petitions. Our conclusion is reinforced by the Supreme Court's recent decision in *O'Sullivan*. In that case, the Court held that before a state prisoner files a federal

habeas petition, he must "give the state courts one full opportunity to resolve any constitutional issues by invoking one complete round of the State's established appellate review process." 119 S. Ct. at 1732. Tolling the federal statute of limitations while the state prisoner is properly adhering to exhaustion requirements reinforces the orderly presentation of claims to the appropriate state tribunals and obviates the need for federal action prompted by AEDPA's statute of limitations.

This sensible construction of AEDPA's requirements accords with the broad construction given the word "pending" in the context of defining a "pending" federal habeas petition. *See McFarland v. Scott*, 512 U.S. 849, 856 (1994) (holding that a post-conviction proceeding is pending when a request for appointment of counsel has been made); *Kelly*, 163 F.3d at 540, *cert. denied*, 119 S. Ct. 1377 (1999); *cf. Hohn v. United States*, 118 S. Ct. 1969, 1972 (1998) (holding that an application for a certificate of appealability constitutes a "case" subject to appellate review). Our construction of the word "pending" in other contexts is consistent with this approach. *See, e.g., Beverly Community Hosp. Ass'n v. Belshe*, 132 F.3d 1259, 1264-65 (9th Cir. 1997) (holding that a "pending" lawsuit, as that word was used in the Balanced Budget Act of 1997, included cases on appeal as well as those undecided by the district court), *cert. denied*, 119 S. Ct. 334 (1998); *Gray v. First Winthrop Corp.*, 989 F.2d 1564, 1571 (9th Cir. 1993) (holding that, for separation of powers purposes, a suit is pending until the availability of appeal is exhausted).

[5] For these reasons, we join the Tenth and Eleventh Circuits in concluding that the AEDPA statute of limitations is tolled for "all of the time during which a state prisoner is attempting, through proper use of state court procedures, to exhaust state court remedies with regard to a particular post-conviction application." *Barnett*, 167 F.3d at 1323.

[6] Applying these principles to California's post-conviction procedure, we hold that the statute of limitations is tolled from the time the first state habeas petition is filed[2] until the California Supreme Court rejects the petitioner's final collateral challenge.[3] AEDPA's statute of limitations is not tolled from the time a final decision is issued on direct state appeal and the time the first state collateral challenge is filed because there is no case "pending" during that interval.

II

[7] Because the statute of limitations was tolled during the period in which Nino was properly pursuing his state post-conviction remedies, the district court erred in dismissing Nino's federal habeas petition as untimely. The statute of limitations in Nino's case began to run on April 24, 1996, the day AEDPA took effect. *See Beeler*, 128 F.3d at 1287-88. Nino filed his first petition for collateral state post-conviction relief in the Los Angeles Superior Court on March 4, 1997. As of the day before, March 3, he had "used" 314 days of his allotted 365 days. On March 11, 1997, the Los Angeles Superior Court denied Nino's first petition. On April 23, 1997, he filed a habeas petition in the California Court of Appeals; that petition was denied on May 1, 1997. On May 20, 1997, he filed

[2]In California, the supreme court, intermediate courts of appeal, and superior courts all have original habeas corpus jurisdiction. *See* Cal. Const. art. VI, § 10. The state prisoner may first present his habeas petition to the superior court. *See* Cal. R. Ct. 260. Although a superior court order denying habeas corpus relief is non-appealable, *see People v. Griggs*, 431 P.2d 225, 227 (Cal. 1967), a state prisoner may file a new habeas corpus petition in the court of appeals, *see In re Reed*, 663 P.2d 216, 217 n.2 (Cal. 1983).

[3]If the California court of appeals denies a habeas petition, the petitioner may seek review in the California Supreme Court by way of a petition for review. *See Reed*, 663 P.2d at 217 n.2; *In re Michael E.*, 538 P.2d 231, 237 n.15 (Cal. 1975). A petitioner may instead file an original habeas petition in the supreme court, but petitions for review are strongly preferred. *See id.*

a petition with the California Supreme Court, which was denied on August 27, 1997. Because he was properly pursuing his state collateral remedies,[4] AEDPA's statute of limitations was tolled until the California Supreme Court denied his petition for review of the court of appeals' denial of his habeas petition. Following that denial, Nino then had fifty-one days before the one-year statute of limitations expired. Nino filed his federal habeas petition on September 15, 1997, rendering his petition timely filed.

III

Tolling during the time a state prisoner is pursuing his state post-conviction remedies allows the state courts to have the unfettered first opportunity to review the prisoner's claim and to provide any necessary relief. By forfending protective federal filings while a state prisoner is properly exhausting state remedies in proceeding from one state court to the next, we avoid the " 'unseem[liness]' of a federal district court's overturning a state court conviction without the state courts having had an opportunity to correct the constitutional violation in the first instance." *O'Sullivan*, 119 S. Ct. at 1732 (quoting *Darr v. Burford*, 339 U.S. 200, 204 (1950)). By staying the federal hand while the state court system is considering the claim, we also recognize that each state is entitled to formulate its own system of post-conviction relief, and ought to be able to administer that system free of federal interference. Tolling AEDPA's statute of limitations until the state has

[4]Because it is not at issue in this case, we express no opinion as to whether tolling pursuant to AEDPA should be applied if the California state courts have dismissed a state habeas petition as untimely because the petitioner engaged in substantial delay in asserting habeas claims. *See In re Robbins*, 959 P.2d 311, 317-18 (Cal. 1998); *In re Clark*, 855 P.2d 729, 745 (Cal. 1993). We also do not express an opinion as to whether tolling would be appropriate if the California state courts had determined the state prisoner had not been properly pursuing his state post-conviction remedies, such as by filing successive petitions. *See Robbins*, 959 P.2d at 322 n.9.

fully completed its review reinforces comity and respect between our respective judicial systems.

For these reasons, we conclude that petitioner's federal claim was timely filed and that the district court erred in dismissing it.

REVERSED AND REMANDED

FILED
AUG 18 1998
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JESUS NINO,	)	No. 98-55563
	)	
Petitioner-Appellant,	)	D.C. No. CV-97-6831-WDK
	)	
vs.	)	ORDER
	)	
GEORGE GALAZA, Warden, et al.,	)	
	)	
Respondents-Appellees.	)	
	)	

Before: BROWNING, THOMAS, and WARDLAW, Circuit Judges

The panel has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc, and no judge of the court has

requested a vote on the suggestion for rehearing en banc. Fed.R.App.P.35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

JUDGMENT

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NO. 98-55563
CT/AG#: CV-97-06831-WDK

JESUS NINO

Petitioner-Appellant

v.

GEORGE GALAZA, Warden; ATTORNEY GENERAL OF THE STATE OF CALIFORNIA

Respondents - Appellees

APPEAL FROM the United States District Court for the Central District of California, Los Angeles.

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Central District of California, Los Angeles and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is REVERSED & REMANDED.

Filed and entered July 6, 1999

SEAL AUG 26 1999

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. CV-97-6831-WDK (RC) **DATE: 9/8/99**

Title: Jesus Nino v. George Galaza, Warden; Attorney General of the State of California

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DOCKET ENTRY

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PRESENT:

The Honorable William D. Keller, Judge

Richard H. Mazzarella	None Present
Courtroom Deputy Clerk	Court Reporter

ATTORNEYS PRESENT FOR PLAINTIFFS:	**ATTORNEYS PRESENT FOR DEFENDANTS:**
None Present	None Present

PROCEEDINGS: (In Chambers)

The Court has received the mandate from the Court of Appeals and it is ordered filed and spread. The matter is re-referred to the Magistrate Judge for a review and recommendation of the re-activated federal habeas petition.

IT IS SO ORDERED.

MINUTES FORM 11

CIVIL--GEN **Initials of Courtroom Deputy Clerk**

FILED
SEP 17 1999

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

JESUS NINO, Petitioner, vs. GEORGE GALAZA, Warden, and ATTORNEY GENERAL OF THE STATE OF CALIFORNIA, Respondents.	)	Case No. CV 97-6831-WDK(RC) ORDER FOLLOWING REMAND

On July 7, 1999, the Ninth Circuit Court of Appeals reversed the Judgment entered January 27, 1998, dismissing the petition for writ of habeas corpus as untimely, and remanded the matter to this Court. Nino v. Galaza, ___ F.3d ___, 1999 WL 451783 (9th Cir. (Cal)). The mandate from the Court of Appeals was received and spread on the record on September 8, 1999.

IT IS HEREBY ORDERED:

1. Respondent(s) shall file and serve an **answer** or **return** to the petition within thirty (30) days after the filing date of this Order. The answer shall respond to the allegations in the petition and address the merits of petitioner's claims. Further, respondents should address:

A. Whether petitioner is in respondent's custody:

B. The cause of petitioner's detention (e.g., pretrial or post-conviction detention, type of judgment, court name and case no.), and indicated what transcripts, if any, are available and when they can be furnished;

C. Whether respondent(s) concedes that the petition should be granted. If respondent disputes any claim raised in the petition, and does not concede that the petition should be granted, then he shall address the merits of each disputed claim and the necessity for an evidentiary hearing to resolve any issue, **and shall lodge with the Court all state records** pertinent to each disputed claim.

2. If petitioner desires to file a **traverse** or **response** to the answer, he shall do so within thirty (30) days of the date the answer is served. The traverse or response shall set forth, separately:

A. Petitioner's admission or denial of each factual allegation in the answer;

B. Additional facts or legal argument responsive to matters raised in the answer; and

C. Shall not raise new grounds for relief not asserted in the petition.

3. Unless the Court orders otherwise, the case will be deemed submitted on the records on file thirty (30) days after the traverse is filed or, in the event no traverse is filed, thirty (30) days after the answer(s) is filed.

IT IS FURTHER ORDERED that the Clerk shall serve copies of this Order on petitioner and respondent.

DATED: Sep. 18, 1999

/s/
ROSALYN M. CHAPMAN
UNITED STATES
MAGISTRATE JUDGE

Service List:

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Los Angeles, CA 90013

Honorable William D. Keller

case976\97-6831.7
9/17/99

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. CV-97-6831-WDK(RC) Date: October 15, 1999

Title: Jesus Nino v. George Galaza, Warden, et al.

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DOCKET ENTRY

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PRESENT: **HON. ROSALYN M. CHAPMAN, UNITED STATES MAGISTRATE JUDGE**

Debra Taylor-Spears	None
Courtroom Deputy Clerk	Court Reporter

ATTORNEYS PRESENT FOR PETITIONER:	**ATTORNEYS PRESENT FOR RESPONDENTS:**
None Present	None Present

PROCEEDINGS: (IN CHAMBERS) Respondents' Application for Stay of Proceedings

The respondents' Application for Stay of Proceedings pending their filing of a petition for writ of certiorari is **DENIED WITHOUT PREJUDICE.** In the event certiorari is granted, or the Supreme Court issues a stay of Nino v. Galaza, 183 F.3d 1003 (9th Cir. 1999), respondents may renew their application.

/s/
ROSALYN M. CHAPMAN
UNITED STATES MAGISTRATE JUDGE

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10/15/99

Initials of Deputy Clerk